

**Apr 26, 2018**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

RICHARD N. BATSON and BEVERLY J.

JONES-BATSON,

Plaintiffs,

v.

DEUTSCHE BANK TRUST AMERICAS,

INDENTURED TRUSTEE FOR SASTA

2005-3 MORTGAGE BACKED ASSETS

2005-3, OCWEN LOAN SERVICING

LLC,

Defendants.

No. 2:15-cv-00193-SAB

**ORDER DISMISSING CASE**

Before the Court is Defendants' Motion to Dismiss for Plaintiffs' Failure to File an Amended Complaint Pursuant to Two Court Orders, ECF No. 178. The motion was heard without oral argument. Defendants request the Court exercise its discretion under Federal Rule of Civil Procedure 41(b), and dismiss this action for Plaintiffs' failure to comply with two court orders. For the following reasons, the Court grants Defendants' motion and dismisses this case.

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**ORDER DISMISSING CASE ^ 1**

## STATEMENT OF FACTS

On June 23, 2015, Plaintiffs filed a Complaint in the Spokane County Superior Court in an attempt to stop the non-judicial foreclosure on the real property located at 12910 E. Sinto Avenue, Spokane Valley, Washington 99216 (the "Property"). The Complaint stated causes of action for Wrongful Foreclosure, Intent to Defraud, Wrongful Claim to Debt Secured by Deed, Violation of Consumer Rights, and Violation of Plaintiffs' Civil Rights. ECF No. 1. The action was removed to the United States District Court for the Eastern District of Washington on July 24, 2015.

On August 4, 2015, Defendant filed a motion to dismiss for failure to state a claim upon which relief could be granted. On August 21, 2015, Plaintiffs filed a "Petition for Temporary Restraining Order" to halt the Trustee Sale of the Property scheduled for October 2, 2015. The Court construed Plaintiffs' pleading as a motion for a preliminary injunction. ECF No. 20.

On November 6, 2015, the Court issued an Order granting in part and denying in part Defendants' motion to dismiss (the "November 2015 Order"). ECF No. 57. The Court dismissed all but Plaintiffs' Real Estate Settlement Procedures Act ("RESPA") claim, and only for alleged violations occurring after June 23, 2012. The Court directed Plaintiffs to file an amended complaint no later than thirty days from the publication of the November 2015 Order. Plaintiffs failed to file an amended complaint as directed.

The Court also denied Plaintiffs' motion for a preliminary injunction, ECF No. 56. The Court found Plaintiffs' had not demonstrated a strong likelihood of success on the merits of their claims.

Instead of filing an amended complaint, Plaintiffs filed a second action in state court, which was promptly removed to this Court. No. 2:15-cv-00329-SAB. On March 22, 2016, the Court dismissed No. 2:15-cv-00329-SAB on claim

1 preclusion grounds. Then, Plaintiffs filed a motion to stay proceedings, which the  
2 Court denied on April 25, 2016. ECF No. 71.

3 Defendants proceeded with a Trustee Sale of the Property on July 22, 2016,  
4 and the Property reverted to the trust. Plaintiffs, facing eviction, filed a motion for  
5 a preliminary injunction on August 1, 2016. The Court construed the motion as  
6 one for a Temporary Restraining Order (“TRO”), and granted the motion to  
7 prevent Plaintiffs’ imminent homelessness. ECF No. 81.

8 At the Court’s suggestion, the parties participated in a settlement conference  
9 conducted by the Chief Bankruptcy Judge of this District. Unfortunately, the case  
10 did not settle. The Court then located a volunteer attorney from the federal bar  
11 association who agreed to meet with and provide advice to Plaintiffs regarding this  
12 case. The TRO remained in place while these efforts were made, to which  
13 Defendants did not object.

14 Almost a year after the Court’s November 2015 Order, Plaintiffs filed a  
15 motion to amend their complaint. ECF No. 97. Plaintiff submitted a proposed  
16 amended complaint, ECF No. 125, and later a revised proposed first amended  
17 complaint. ECF No. 149. On August 30, 2017, the Court granted in part and  
18 denied in part Plaintiffs’ motion to amend (the “August 2017 Order”). ECF No.  
19 170.

20 The Court did not accept Plaintiffs’ proposed first amended complaint as  
21 drafted because many of the proposed claims had previously been dismissed, or  
22 failed as a matter of law. Instead, the Court stated “[a] complaint alleging claims in  
23 accordance with the Order may be filed.” The August 2017 Order provided  
24 Plaintiffs with a framework to file an amended complaint alleging the following:  
25 (1) any claims for alleged RESPA violations occurring after June 23, 2012 (the  
26 earliest possible date for RESPA claims to survive the statute of limitations); (2)  
27 any Consumer Protection Act (“CPA”) claims predicated on RESPA violations;  
28 and (3) an unaddressed CPA claim for attempting to collect on a stale debt within

1 the statute of limitations. Plaintiffs failed to file an amended complaint in  
2 accordance with the Court's August 2017 Order.

3 Approximately two months later, the Court held a telephonic status  
4 conference in order to set discovery and dispositive motion deadlines. Discovery  
5 in this matter was to be completed by January 31, 2018, and any dispositive  
6 motion were to be filed no later than March 15, 2018. In an attempt to comply with  
7 the deadlines set by the Court, Defendants served written discovery upon Plaintiffs  
8 and inquired about deposition dates. Plaintiffs did not respond to those inquiries.

9 On January 31, 2018, Defendants filed the instant motion requesting the  
10 Court dismiss this action because Plaintiffs failed to file an amended complaint as  
11 directed by two of the Court's Orders. ECF No. 178. Thirty-six days later,  
12 Plaintiffs responded by filing a Motion for Sanctions, ECF No. 184.

### 13 STANDARD

14 Federal Rule of Civil Procedure 41(b) provides that "[i]f the plaintiff fails to  
15 prosecute or comply with these rules or a court order, a defendant may move to  
16 dismiss the action or any claim against it." Fed. R. Civ. P. 41(b). "[W]hen a  
17 plaintiff fails to amend his complaint after the district judge dismisses the  
18 complaint with leave to amend, the dismissal is typically considered a dismissal  
19 for failing to comply with a court order rather than for failing to prosecute the  
20 claim." *Yourish v. Cal. Amplifier*, 191 F.3d 983, 986 (9th Cir. 1999).

21 To determine whether to dismiss a case for failure to comply with a court  
22 order, the Court must weigh the following factors: "(1) the public's interest in  
23 expeditious resolution of litigation; (2) the court's need to manage its docket; (3)  
24 the risk of prejudice to the defendants; (4) the public policy favoring disposition of  
25 cases on their merits; and (5) the availability of less drastic alternatives." *Fredrik v.*  
26 *Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992). While preferred, it is not  
27 required that the court make explicit findings to show that it has considered these  
28 factors. *Id.*

## DISCUSSION

### I. Motion to Strike

In response to Defendants' motion to dismiss, Plaintiffs filed a Motion for Sanctions, ECF No. 184. Defendants request the Court strike this pleading as untimely. Local Rule 7.1 governs motions practice in the United States District Court for the Eastern District of Washington. It provides that unless the court orders otherwise, a pro se litigant must respond to a dispositive motion<sup>1</sup> within thirty days after the mailing of the motion, as noted on the certificate of mailing. LR 7.1(b)(2)(A). If the pro se litigant is registered for Electronic Case Filing, the applicable time begins when the motion is filed. *Id.* "The failure to comply with the requirements of LR 7.1(a) or (b) may be deemed consent to the entry of an Order adverse to the party who violates these rule." LR 7.1(d).

The Court finds Plaintiffs' response to Defendants' motion is untimely. Defendants filed their motion to dismiss on January 31, 2018, and mailed and emailed a copy of the motion to Plaintiffs that same day. As such, Plaintiffs' response was due no later than March 2, 2018. On March 8, 2018, Plaintiffs responded to Defendants' motion by filing a motion for sanctions. Accordingly, the Court strikes Plaintiffs' response as untimely.

### II. Motion to Dismiss

#### The Public's Interest in Expeditious Resolution of Litigation

"[T]he public's interest in expeditious resolution of litigation always favors dismissal." *Yourish*, 191 F.3d at 990. Plaintiffs' failure to comply with two of the Court's Orders has interfered with the public's interest in expeditious resolution of this matter.

First, the Plaintiffs failed to file an amended complaint as directed by the Court's November 2015 Order. Instead of filing an amended complaint, Plaintiffs

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<sup>1</sup> A motion to dismiss is considered a dispositive motion. LR 7.1(a)(3).

1 filed numerous motions, many of which lacked merit and served no purpose other  
2 than to cause unnecessary delay. Plaintiffs also chose to file a second action in  
3 state court. That action was later removed to this Court, and dismissed on claim  
4 preclusion grounds. Despite Plaintiffs' noncompliance with the November 2015  
5 Order, the Court granted Plaintiffs a second opportunity to file an amended  
6 complaint in its August 2017 Order. Again, Plaintiffs failed to comply with the  
7 Court's Order. Plaintiffs' conduct has resulted in a significant and unwarranted  
8 delay in the resolution of this matter. As such, this factor strongly weighs in favor  
9 of dismissal.

#### 10 **The Court's Need to Manage its Docket**

11 "District judges are best situated to decide when delay in a particular case  
12 interfered with docket management and public interest." *Ash v. Cvetkov*, 739 F.2d  
13 493, 496 (9th Cir. 1984). Plaintiffs' failure to comply with two of the Court's  
14 Orders has resulted in significant delay in the resolution of this case, and forced  
15 the Court to expend significant judicial resources to try and keep this case moving  
16 forward. This has interfered with the Court's ability to manage its docket. As such,  
17 this factor also weighs strongly in favor of dismissal.

#### 18 **The Risk of Prejudice to Defendants**

19 In assessing this factor, the Court examines "whether the plaintiff's actions  
20 impair the defendant's ability to go to trial or threaten to interfere with the rightful  
21 decision of the case." *Malone v. U.S. Postal Service*, 833 F.2d 128, 131 (9th Cir.  
22 1987). "Whether prejudice is sufficient to support an order of dismissal is in part  
23 judged with reference to the strength of the plaintiff's excuse for the default." *Id.*

24 The Court finds Plaintiffs' actions have impaired Defendants' ability to go  
25 to trial. Aside from failing to file an amended complaint, Plaintiffs have also failed  
26 to cooperate with Defendants during the discovery process. Moreover, Plaintiffs  
27 offer no excuse for failing to comply with the Court's directive. Therefore, this  
28 factor also weighs in favor of dismissal.

**ORDER DISMISSING CASE ^ 6**

1 **The Public Policy Favoring Disposition of Cases on their Merits**

2       The Court provided Plaintiffs numerous opportunities to obtain a  
3 disposition on the merits of their case against Defendants. On two separate  
4 occasions, the Court granted Plaintiffs leave to file an amended complaint. In each  
5 Order, the Court provided Plaintiffs with a framework to file an amended  
6 complaint with plausible claims. In fact, in its August 2017 Order, the Court  
7 provided Plaintiffs guidance in bringing a CPA claim under an unaddressed legal  
8 theory. The Court has gone above and beyond its duty to assist Plaintiffs in this  
9 case. *See Ferdik v. Bonzelet*, 963 F.3d 1258, 1261 (9th Cir. 1992) (“At all stages  
10 of these proceedings the district court not only demonstrated more than adequate  
11 sensitivity to [plaintiff’s] inexperience as a pro se litigant, but also went out of its  
12 way to assist him.”). Plaintiffs simply have failed to take advantage of the  
13 opportunities and assistance provided to them. For that reason, this factor merits  
14 little weight against dismissal.

15 **The Availability of Less Drastic Alternatives**

16       “In considering whether less drastic sanction are available, the Court should  
17 consider the feasibility of lesser sanctions, whether such sanctions have already  
18 been imposed, and whether Plaintiff has been warned of the possibility of  
19 dismissal.” *Aziparte v. King County*, 2009 WL 564732, No. C07-1998-JCC at \*7  
20 (W.D. Wash. March 3, 2009) (citing *Malone*, 833 F.2d at 132).

21       As indicated above, the Court has provided Plaintiffs the opportunity to  
22 amend their complaint on two separate occasions. It has been over two years since  
23 the November 2015 Order directed Plaintiffs to file an amended complaint. The  
24 Court is not confident that a third opportunity to amend will be any different. And  
25 while the Orders did not explicitly warn Plaintiffs that failure to file an amended  
26 complaint would result in dismissal, it is clear that the Orders required action on  
27 the Plaintiffs’ part. It should be no surprise to Plaintiffs that failure to comply with  
28 a court order would have consequences.

**ORDER DISMISSING CASE ^ 7**

1 The Court has used less drastic alternatives to dismissal of this action, and  
2 finds they have not worked. As such, this factor also weighs in favor of dismissal.

3 **CONCLUSION**

4 For the foregoing reasons, the Court exercises its discretion to dismiss  
5 Plaintiffs' action pursuant to Fed. R. Civ. P. 41(b), for Plaintiffs' failure to comply  
6 with two Court Orders.

7 Accordingly, **IT IS HEREBY ORDERED:**

8 1. Defendants' Motion to Dismiss for Plaintiffs' Failure to File an Amended  
9 Complaint Pursuant to Two Court Orders, ECF No. 178, is **GRANTED**.  
10 Plaintiffs' action is hereby **DISMISSED with prejudice**.

11 2. Defendants' Motion to Strike Plaintiffs' Untimely Response to  
12 Defendants' Motion to Dismiss, ECF No. 185, is **GRANTED**. Plaintiffs' Motion  
13 for Sanctions, ECF No. 184, is **STRICKEN**.

14 3. Any pending motions are **DISMISSED as moot**.

15 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter  
16 this Order, provide copies to counsel and pro se Plaintiffs, and **close** this file.

17 **DATED** this 26th day of April 2018.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

23 Stanley A. Bastian  
24 United States District Judge  
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